No. 18271

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Jaime J. Merino,

Appellant,

vs.

Theodore Hocke, United States Commissioner, etc., and the United States of America,

Appellees.

AMICUS CURIAE BRIEF.

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I.

Statement of the Case.

The appellant's statement of the case as contained on pages 1 through 4 is not controverted.

II.

Appellant's Argument That the District Court Erred in Denying Appellant's Application in the Nature of a Writ of Mandamus Compelling the United States Commissioner to Permit Appellant to Take Depositions in the Republic of Mexico, or for an Order to Take Depositions Under the Appropriate Deposition Statutes of the United States Is Not Supported by Case Law or Statutes.

The following case law is cited in support of the argument that the above contention of appellant is without merit.

The attention of the Court is respectfully directed to the following recent case:

> "Marcos Perez Jimenez vs. Manuel Aristeguieta, 311 F. 2d 547 (5th Cir. 12/12/62), certiorari denied. Habeas Corpus proceedings by former Venezuela Chief Executive on ground that his commitment to custody and detention as result of extradition proceedings was unlawful. Appeal from District Court judgment dismissing the petition for habeas corpus filed by appellant, Marcos Perez Jimenez.
>
> Appellant contended denial of due process of law in District Judge's denial of request to take the deposition of a witness, pointing to 18 U.S.C. 3191."

Held:

1.— (page 556) "Section 3191 relates to the subpoenaing of witnesses and not to depositions." Supreme Court cited In Re Luis Oteiza y Cortes (136 U. S. 330) which held that the predecessor statute to Section 3191 "does not apply to documents or depositions offered on the part of the accused" and "that all the provisions of the law and statute contemplated the production of the defendant's witnesses in person before the magistrate for examination by him." It was held in a collateral discovery proceeding in this case that 18 U.S.C. 3190 permitting the use of properly authenticated *ex parte* depositions presented by the demanding country are not available to the defendant.

Aristeguieta v. Jiminez, 274 F. 2d 206, *cert. granted,* 345 U. S. 840;

First Nat. Bank of N. Y. v. Aristeguieta.

2.— "With respect to the evidence upon which the extradition magistrate acted, it must be remembered that the extradition merely determines probable cause making an inquiry like that of a committing magistrate and no more."

Benson v. McMahon, 127 U. S. 457, 463.

Probable cause was given its classic definition by Chief Justice Marshall when he held that he should not require evidence to convince himself that the defendant was guilty, but only that "furnishing good reason to believe that the crime alleged to have been committed by the person charged with having committed it".

III.

The Appellant Erroneously Cites 18 U. S. C. 3191 as Authority for the Right to Take Depositions by Way of a Subpoena in a Foreign Country.

This statute entitled "Witnesses For Indigent Fugitives": is clearly inapplicable to the instant case. The statute requires the following elements:

1. An affidavit to be filed by the person charged setting forth that there are witnesses whose evidence is material to his defense.

2. That he cannot safely go to trial without them.

3. What he expects to prove by each of them.

4. And that he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses.

There is nothing in the record to indicate that the above elements are present in the case at bar. During the course of the extradition hearing the defendant produced several witnesses on his own behalf. These witnesses were brought from Mexico. The fugitive has employed many attorneys during the course of the proceedings and presented an expert witness and received the professional assistance of one of the ablest Mexican criminal lawyers who associated with his defense counsel. He is now at liberty on cash bail of $20,000.00.

It is respectfully submitted that the above facts and circumstances do not indicate that Section 3191 is applicable in this instance.

IV.

In View of the Denial of the Motion by the Circuit Court to Consolidate This Appeal With the Appeal From the Denial of the Petition for a Writ of Habeas Corpus, the Issue Before the Court at This Time Is Solely That of Matters Related to the Alleged Right of the Fugitive to Take Depositions in Mexico. It Is Contended That Appellant's Arguments Regarding Denial of Due Process of Law and Other Unrelated Matters Are Not the Proper Subject of This Appeal. No Answer to Appellant's Brief on These Extraneous Points Will Be Presented at This Time.

Appellant's brief seeks to bring before the Court matters such as discovery proceedings which have been liberalized by various Supreme Court decisions. Such

decisions, however, involved civil and criminal cases, and it is well-settled that extradition proceedings are not criminal in nature. It is contended that there is no analogy between discovery proceedings and the present issue. In discovery proceedings the defendant seeks access to matters in the possession of the prosecution. Such is not the case here. The evidence, if any, sought to be elicited by the fugitive, is not in the possession or control of the Government. The fugitive, as indicated before, produced witnesses who testified in his behalf.

V.

Conclusion.

In Conclusion, therefore, it is respectfully submitted that on the basis of the precedent set in 1890 by the Supreme Court, and affirmed through the years up to 1963 in the cases cited herein, the District Court did not err in denying appellant's request regarding depositions and its ruling should be affirmed.

Newman & Newman,
By Philip M. Newman,
Amicus Curiae.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Philip M. Newman